JD(SF)–49–05
Bloomington, MN

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**SAN FRANCISCO DIVISION OF JUDGES**

**PARK 'N FLY, INC.**

**and** **Cases 18-CA-17441**
**18-CA-17511**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 120**

***Nichole L. Burgess-Peel, Atty,*** of Minneapolis, Minnesota, for the General Counsel
***Martin J. Costello, Atty,*** of St. Paul, Minnesota, for the Charging Party
***Clifford H. Nelson, Jr., Atty,*** of Atlanta, Georgia, for the Respondent

## DECISION

Mary Miller Cracraft, Administrative Law Judge: This case involves various allegations that Park 'N Fly, Inc. (Respondent) committed violations of Section 8(a)(1) and (3) of the National Labor Relations Act.[1] International Brotherhood of Teamsters Local 120 (the Union) initially filed an unfair labor practice charge in Case 18-CA-17441 on October 20, 2004,[2] and amended it on December 13. The Union filed the unfair labor practice charge in Case 18-CA-17511 on January 4, 2005, and amended it on February 8, 2005. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued by the Regional Director for Region 18 of the National Labor Relations Board on February 24, 2005. The trial took place in Minneapolis, Minnesota on May 9-11, 2005.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, I make the following

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[1] Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Sec. 158(a)(1), provides "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." Section 7 sets forth the rights of employees, including, inter alia, the right to form, join, or assist labor organizations. Section 8(a)(3) of the Act, 29 U.S.C. Sec. 158(a)(3), prohibits discrimination which encourages or discourages membership in any labor organization.

[2] All dates are in 2004 unless otherwise referenced.

[3] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or omitted facts, apparent probability, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

## Findings of Fact

### A. Jurisdiction and Labor Organization Status

Respondent is a Delaware corporation with an office and place of business at the Minneapolis-St. Paul International Airport in Bloomington, Minnesota, where it provides parking and shuttle services for airline passengers. During calendar year 2004, Respondent derived gross annual revenue in excess of $500,000 and purchased and received goods and services valued in excess of $50,000 directly from points located outside the State of Minnesota. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### B. Background

Respondent provides parking and shuttle services for airline passengers at airports throughout the United States. At its Bloomington, Minnesota facility, near the Minneapolis-St. Paul International Airport, Respondent employs full-time, part-time, and standby van drivers as well as cashiers.

Since April 2002, Daryl Anderstrom has been the manager of the Bloomington operation. Anderstrom's assistant managers are Bruce Pram and Bruce Davidson. Two full-time dispatchers, Elaine Pessek and Lee Majeski, complete the facility's management team. Six non-supervisory, part-time dispatchers are utilized for weekend work.

Currently, Anderstrom reports to Brett Bodenan, vice-president of operations for the East Coast. Bodenan works in the corporate office in Atlanta, Georgia. However, until November or December, Anderstrom reported to Dennis O'Riley, former vice-president of operations. Former vice-president Billy Gipson, at all times material herein, has been a consultant to Respondent.

The Bloomington facility employs about 47 full-time and part-time drivers, 10 standby drivers, and 10 cashiers (some of whom are also drivers). Drivers work one of three shifts: early morning, early afternoon, or early evening. Drivers' starting times are staggered. Elaine Pessek, the early morning dispatcher, works from 4 a.m. to 1 p.m., while Lee Majeski, the early afternoon dispatcher, works from 1 p.m. to 9 p.m.

In June, the Union was contacted by some of Respondent's employees. Respondent acknowledged it knew of this Union activity by late June.

Following execution of employee authorization cards, on July 13, the Union filed a petition for representation. The parties agreed to hold a secret ballot election on August 24. However, no election was held because the Union withdrew the petition. On August 23, the Regional Director for Region 19 approved withdrawal of the petition.

General Counsel alleges that Respondent reacted to the Union campaign by committing various actions in violation of Section 8(a)(1) and (3) of the Act. These allegations are discussed seriatim.

## C. Alleged Independent Interference, Restraint, or Coercion

1. About mid-July Anderstrom interrogated an employee about who started the Union -- consolidated complaint ¶5(a)

Night-shift driver/cashier Robert Wadsworth, a 9-year employee of Respondent's, testified that while he and manager Daryl Anderstrom were in a waiting room at the facility, Anderstrom told Wadsworth to sit down.[4] No one else was present. Anderstrom asked Wadsworth if he knew who started the Union. Anderstrom also asked Wadsworth if he knew what the Union was all about and if he knew what he was voting for.

While Anderstrom agreed that he spoke to many employees about the Union, he could not recall which employees and what was said. Anderstrom recalled that the conversations were generally about the importance of voting. Nevertheless, Anderstrom denied that he ever solicited employee feelings about the Union, asked employees how they would vote, or asked whether employees were engaged in Union activity. Anderstrom did not specifically deny asking employees, or Wadsworth specifically, who started the Union. Because Anderstrom did not specifically deny asking who started the Union and because Wadsworth's testimony was credible, I find that Anderstrom did ask Wadsworth if he knew who started the Union.

Asking an employee about his knowledge of Union activities may, depending on the totality of the circumstances, reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Blue Flash Express,* 109 NLRB 591, 592-595 (1954); see also, *Michigan Roads Maintenance Co.,* 344 NLRB No. 77, slip op. at 1 (2005), citing *Donaldson Bros. Ready Mix,* 341 NLRB No. 124, slip op. at 2 (2004). Although not exhaustive, the circumstances which may be considered in evaluating the tendency to interfere are the background, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985); *Rossmore House,* 269 NLRB 1176,1178 n. 20 (1984).

My examination of the totality of the circumstances convinces me that Anderstrom's questioning of Wadsworth reasonably tended to interfere with, restrain, or coerce employees in the exercise of the Section 7 right, inter alia, to form a labor organization. Anderstrom, the highest official of Respondent at the facility, requested that Wadsworth sit down for a one-on-one conversation. Anderstrom immediately asked Wadsworth who started the Union. No valid business reason was apparent for requesting this information. An employee would reasonably assume from such a question that the person who started the Union might be in trouble. Moreover, there is no evidence that Wadsworth was an open supporter of the Union. In fact, according to Anderstrom, the only open supporter of the Union was Larrys Krueger. For these reasons, based upon a preponderance of the credible evidence, I find that Anderstrom's questioning of Wadsworth reasonably tended to interfere with, restrain, or coerce employees in the exercise of Section 7 rights, including the right to form a labor organization.

[4] Wadsworth placed the time of this conversation as "before the voting" but after the organizing started. Wadsworth believed the organizing began in July (although it actually began in late May or early June). The election was scheduled for August 24. Thus, Wadsworth's testimony places his conversation with Anderstrom somewhere between July 1 and August 24.

2. About mid-July, Pessek interrogated an employee about who started the Union, threatened the employee with unspecified reprisals for supporting the Union, and threatened the employee that he could be fired for insignificant issues if the Union were selected – consolidated complaint ¶5(b), (c), and (d)

Driver/cashier Robert Wadsworth testified that dispatcher Elaine Pessek called him into her dispatch booth in about the last half of July or the first few weeks of August.[5] Wadsworth drove his van to the booth and emerged from it carrying a pop can. Pessek stated, "When the union comes in here they can fire you for [having a pop can in your van]." At the time of the conversation, Respondent's policy was to write up employees for having beverage containers in the van. Thus, Pessek's remark indicated more severe punishment, i.e., discharge, in the event the Union were selected to be the employees' representative.

Wadsworth rejoined, "It's not my pop can. A customer left it." Pessek continued, "Do you know who started [the] union?" Wadsworth said he did not. Pessek also told Wadsworth that if the Union came in, employees would have to pay Union dues and the workplace would be run more strictly. Finally, Pessek told Wadsworth that the facility might close if light rail slowed traffic.[6] Pessek did not refute Wadsworth's testimony.

Because Pessek did not dispute Wadsworth's testimony, I find that Pessek made the statements attributed to her by Wadsworth, who was a credible witness. It is unlawful to threaten stricter enforcement of rules or policies because employees may vote to have Union representation. See, e.g., *Miller Industries Towing Equipment,* 342 NLRB No. 112, slip op. at 1, 11-12 (2004)(statement that rules would be enforced to the letter if the Union came in held violative), citing *Mid-Mountain Foods,* 332 NLRB 229, 237-238 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001). Thus, Pessek's statement: that the workplace would be more strictly run if a union came in, reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Similarly, Pessek's threat of discharge for insignificant policy infractions, such as possession of a pop can, constitutes a threat that an employee could be fired for insignificant issues if the Union were selected. Such a threat reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *Genesee Family Restaurant & Coney Island,* 322 NLRB 219, 224 (1996), enfd. as modified, 129 F.3d 1264 (6th Cir. 1997), relied upon by General Counsel.

Finally, based upon the totality of the circumstances, as set forth in *Blue Flash Express, supra,*109 NLRB at 592-595, I find that Pessek's questioning of Wadsworth about who started the Union reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Thus, Pessek, Wadsworth's immediate supervisor, summoned Wadsworth to her dispatch booth for a one-on-one conversation. Prior to interrogating him, Pessek first threatened that he could be fired for insignificant infractions if the Union came in.

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[5] Wadsworth testified that this conversation occurred before the voting but after he knew when the election would be. The parties stipulated to the August 24 election date on July 21 based upon the Union's July 13 petition for representation. Thus, Wadsworth's testimony places the conversation roughly in the last half of July or the first few weeks of August.

[6] There is nothing in Wadsworth's pre-trial affidavit given to the NLRB which refers to closing of the facility. Wadsworth testified that he remembered this remark only when going through pre-trial preparation. The consolidated complaint does not allege a threat of closure.

Pessek's tone of voice indicated animosity toward the Union. Pessek had no legitimate business reason for wanting to know the name of the person who started the Union and her tone of voice indicated no friendliness to the employee who instigated the Union. Accordingly, it was reasonable for Wadsworth to assume that Pessek did not intend anything positive for an employee who started the Union. Based upon a preponderance of the credible evidence, I find that the totality of the circumstances warrants a finding that Respondent's question reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

3. About mid-July, Pessek threatened an employee that Respondent did not need a Union and that the employee was a troublemaker – consolidated complaint ¶5(e)

Van driver Dan Kassera testified that he encountered dispatcher Elaine Pessek in the break room shortly after July 13, the date the petition for representation was filed by the Union. At this point, the employees were talking about Union representation and expected that the Union would win the election. Pessek angrily stated, "we don't need a damn union around here . . . You are nothing but a damn troublemaker." Pessek did not refute Kassera's testimony. I credit Kassera's testimony and find that Pessek told Kassera that Respondent did not need a "damn union" and that Kassera was nothing but a "damn troublemaker".

General Counsel argues that characterizing Kassera as a " damn troublemaker" in the context of stating that Respondent does not need a "damn union" constitutes an unlawful threat, relying on *L.C. Cassidy & Son,* 272 NLRB 123 n. 2 (1984), enfd. 745 F.2d 1059 (7th Cir. 1984). In that case, the judge found that Cassidy Sr. said that employee Turk was a troublemaker who started the union and agitated employees. Cassidy Sr. continued that he knew Turk was waiting to get fired so he could get money from the company. Cassidy Sr. then said that Turk would get nothing because when the company fired Turk, they would ensure that they would beat Turk. *Id.,* 272 NLRB at 124. The Board found that the company violated Section 8(a)(1) by describing Turk as a "troublemaker" who started the union and would be fired. The Order characterizes this finding as a threat to discharge because of union activity.

Read literally, the Board's finding at footnote 2 in *L C. Cassidy & Son* might serve as authority for a separate finding that characterizing an employee as a troublemaker because he started the Union constitutes an independent violation of Section 8(a)(1). However, read in the context of the Order, the characterization as a "troublemaker," is simply part of the threat of discharge. Although there is ample authority that characterization of a union supporter as a "troublemaker" constitutes evidence of animus, [7] I do not find an independent Section 8(a)(1) violation based upon characterization of Kassera as a "damn troublemaker" in the context of stating that Respondent does not need a "damn union." Moreover, Pessek's statement that Respondent did not need a union does not, standing alone, constitute a threat.

4. In about late July, Pessek interrogated an employee about employees' Union activities – consolidated complaint ¶5(f)

Dispatcher Elaine Pessek testified that she questioned a midnight driver, Vince, asking why none of the employees who constituted the "Employees for Justice Coalition" had signed a

[7] See, e.g., *United Parcel Service,* 340 NLRB No. 89, slip op. at 2 (2003)(evidence of animus in characterizing employee as troublemaker; *Del Rey Tortilleria*, 272 NLRB 1106, 1115 n. 21 (1984)(calling employee a troublemaker is evidence of animus).

letter they sent to the homes of all employees. The letter concluded by urging employees to vote for the Union on Tuesday.[8] There is no evidence that Vince was an open Union supporter.

General Counsel argues that Pessek's question was clearly an attempt to determine the Union sympathies of Vince and other employees, relying on *Sundance Construction Management,* 325 NLRB 1013 (1998)(supervisor who initiated a conversation with employee by asking how many employees supported the union violated Section 8(a)(1) by interrogating the employee, who was not an open union advocate).

Asking an employee about his knowledge of Union activities may, depending on the totality of the circumstances, reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Blue Flash Express, supra,* 109 NLRB at 592-595. Although not exhaustive, the circumstances which may be considered in evaluating the tendency to interfere are the background, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Sunnyvale Medical Clinic, supra,* 277 NLRB at 1218; *Rossmore House, supra,* 269 NLRB at n.20.

My examination of the totality of the circumstances convinces me that Pessek's questioning of Vince reasonably tended to interfere with, restrain, or coerce employees in the exercise of the Section 7 right, inter alia, to form a labor organization. Pessek, Vince's immediate supervisor, questioned him about the employees constituting a pro-Union employee coalition. There was no apparent valid business reason for requesting this information. There is no evidence that Vince was an open Union supporter. Pessek's question sought information about a group of pro-Union employees. An employee would reasonably assume from Pessek's question that Pessek was attempting to determine the union sympathies of Vince and other employees. Based upon a preponderance of the credible evidence, I find that the totality of the circumstances warrants a finding that Respondent's question reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

5. <u>About early August, Pessek interrogated an employee about the employee's Union activities and created the impression that the employee's Union activities were under surveillance – consolidated complaint ¶5(g) and (h)[9]</u>

Van driver Alvin Filipek testified that he spoke to dispatcher Elaine Pessek in the lunch room in early August. She asked if Filipek had talked to a Union guy and he said, "No, I did not." Pessek accused him of lying and he said, "Okay. I have talked to a union guy." Pessek explained that another employee, Dan McCauly, had seen Filipek talking to a Union representative (identified by Filipek as Leland Johnson) and McCauly reported the incident to Pessek. Pessek accused Filipek of being in the Union. Pessek agreed that she asked some employees how they felt about the Union and whether it would be worth paying Union dues. However, Pessek did not deny making the statements attributed to her by Filipek.

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[8] This letter was typed in all capital letters.

[9] The General Counsel moves to withdraw 5(h), "In view of the record testimony regarding Pessek's statements. . . ." McCauly legitimately found out about Filipek visiting with Johnson. See n. 11, p. 18 of brief. However, the Board does not require that an employer's words to an employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means. *Sam's Club*, 342 NLRB No. 57, slip op. at 1 (2004); *United Charter Service*, 306 NLRB 150, 151 (1992). Accordingly, General Counsel's motion is denied.

An employer engages in unlawful surveillance or creates the impression of surveillance when it engages in conduct from which, under the circumstances, the employee could reasonably conclude that his protected activities are being monitored. See, e.g., *Sam's Club,* 342 NLRB No. 57, slip op. at 1-2 (2004)(manager created impression surveillance by telling employee that he heard employee had circulated a petition); *Martech Medical Products,* 331 NLRB 487 n. 4, 501 (2000)(manager's statement that she heard there was a list circulating with 80 names clearly created the impression of monitoring employees' activities).

Pessek stated that Filipek was lying when he denied talking with a Union representative and told Filipek that another employee had reported that Filipek was talking with a Union representative. Based upon these statements, Filipek could reasonably conclude that his Union activity was being monitored. Moreover, based on the totality of the circumstances, I find that Pessek's questioning of Filipek about his Union sympathies constitutes an independent violation of Section 8(a)(1) as well, because it reasonably tends to interfere with, coerce, or restrain Section 7 activity.

Regarding the alleged interrogation, I note that Pessek, Filipek's immediate supervisor, began the one-on-one conversation in the lunch room by asking if Filipek had talked to a Union representative. When Filipek denied that he had, Pessek accused Filipek of lying and reported that another employee had, in fact, seen Filipek talking to a Union representative and reported his activity to her. The conversation was, thus, somewhat adversarial. There is no evidence that Filipek had engaged in open Union activity. Based on this totality of circumstances, I find that a preponderance of the credible evidence proves that Respondent's interrogation reasonably tends to interfere with, coerce, or restrain Section 7 activity.

6. <u>About early August, Pessek threatened an employee that employees would get less money if the Union came in and that the owner of the company would not go for the Union – consolidated complaint ¶5(i)</u>

Following the above conversation, van driver Filipek went out on a run and cogitated about dispatcher Elaine Pessek's comments. Filipek returned to Pessek's dispatch booth and said, "I cannot drive under these conditions any more. It's tearing me up. I did not bring in the Union. I had nothing to do with it." Pessek told Filipek that the Union would not do the employees any good. She said that she only had two years left prior to retirement and she did not want to pay union dues. She said things would not be the same and Respondent would probably go broke. She added that Respondent's owner would not "go for a union in there." Pessek insisted that Filipek had brought the Union in and he kept denying it. Finally he broke down and cried.

Kassera encountered Filipek while he was sitting on a stool outside the break room, sobbing. Kassera inquired what was wrong and Filipek responded that Pessek had yelled at him because of his Union activity and support. Filipek told Kassera that he could not take any more. Filipek left work for the remainder of his shift.

Filipek's testimony is credited. I find that Pessek told Filipek that Respondent would not go for a union and the Union would not do employees any good.[10] This statement constitutes a

[10] There is no evidence that Pessek told Filipek that employees would earn less money if the Union represented them. Accordingly, that portion of the complaint allegation is dismissed.

threat of futility. See, e.g., *Commercial Erectors,* 342 NLRB No. 94, slip op. at 4, n. 4 (2004) (prediction that company will not go union constitutes a threat of futility).

Although the complaint does not allege that Respondent violated the Act by Pessek's statement to Filipek that Respondent would probably go broke, General Counsel urges that Pessek's statement that the company would probably go broke, although not specifically alleged, should nevertheless be found a violation, asserting that this issue is closely connected to the subject matter of the complaint and was fully litigated.

An unpleaded but fully litigated matter may support an unfair labor practice finding despite lack of an allegation in the complaint. *Garage Management Corp.,* 334 NLRB 940 (2001). Generally, amendments are permitted when they are sufficiently related to existing allegations and no undue prejudice would be visited on the respondent. See *Payless Drug Stores*, 313 NLRB 1220, 1220–1221 (1994). Where cross examination by Respondent would not have differed had General Counsel's evidence been directed at the additional violation sought in the motion to amend the complaint, amending the complaint does not present a violation of Respondent's right to due process. *See Free Flow Packaging v. NLRB,* 566 F.2d 1124, 1131 (9th Cir. 1978)(no due process violation when cross-examination would not have been any different if evidence had been directed toward additional violation). I find that the allegation herein is closely related to the subject matter of the complaint and was fully litigated. In this connection, I find that Respondent violated the Act when Pessek told Filipek that Respondent would probably go broke if the Union came in. This reasonably tended to interfere with, coerce, or restrain employees' Section 7 activity.

7. <u>About mid-August, O'Riley and Gipson threatened employees that if the Union were voted in, the bargaining would begin from zero – consolidated complaint ¶5(j)</u>

Van driver Alvin Filipek testified that at an August 5[11] meeting at the local Hilton Hotel, Respondent showed films about how unions damage companies. According to Filipek, consultant Billy Gipson then told employees that if Respondent had to bargain with the Union, everything would start from zero. Filipek admitted on cross-examination that he did not recall anyone's exact words because he was quite upset and in tears during the meeting due to his earlier encounter with dispatcher Elaine Pessek, as discussed above. Cashier and van driver Troy Kirchner testified that he attended the same meeting. He recalled that one of the speakers, he could not recall which one – either then vice-president of East Coast operations Dennis O'Riley or Gipson, said that unions are outdated. They are a bunch of mobsters. The speaker warned that during bargaining, a union may actually agree to wages lower than the employees' current wages, because the parties "have to start from zero when [they] bargain."

Billy Gipson, who was senior vice president of Respondent from 1994 to 2004 and since then, a consultant for Respondent, testified he visited the Bloomington facility during the Union campaign. He described his purpose in visiting the facility as educational – to let employees know what they were voting for and to stress the importance of voting. Gipson also told employees that Respondent did not feel that the employees needed a Union. Gipson recalled employee comments after the films were shown at the Hilton on or about August 5. He characterized employee comments as assertions that they would automatically get certain benefits or wages if the Union came in. In response, Gipson recalled telling employees that if the Union came in, everything was subject to negotiations. Everything was basically on the table and negotiable. Employees could have the same level of wages and benefits or they could have

[11] The date of the meeting was stipulated by the parties.

more or less, depending on the outcome of negotiations. Gipson specifically denied telling employees that bargaining would begin from zero or bargaining would start from scratch. Gipson did not believe that anyone else in management spoke to employees about bargaining.

Anderstrom corroborated Gipson's testimony. Anderstrom recalled that Gipson told employees that everything was negotiable. Anderstrom did not recall that Gipson stated that bargaining would begin at zero.

I credit the testimony of Gipson and Anderstrom. Although Filipek and Kirchner were generally credible witnesses, Filipek admitted that he was upset from the earlier incident with Pessek and Kirchner recalled negative statements about the Union, but was unable to recall the speaker. Gipson was generally truthful and demonstrated an understanding of labor law. Anderstrom's testimony supports Gipson's statement in detail and, absent a further showing that either Gipson or O'Riley made the statement that parties "have to start from zero when [they] bargain," I find insufficient evidence to support that O'Riley or Gipson threatened employees.

8. <u>About mid-to-late August, O'Riley and Gipson, while meeting with individual employees, solicited grievances and promised to remedy them – consolidated complaint ¶5(k)</u>

In late June, Anderstrom e-mailed O'Riley about the advent of Union activity at the facility. Anderstrom noted that in conversations with employees, three topics had been brought up: a coupon in the newspaper stating "complimentary luggage assistance," cameras in the vans, and relatives no longer being allowed to park free. When O'Riley visited the facility in July, he addressed these three issues when he spoke at two employee meetings. By memorandum of July 29, Respondent noted a drop in tips since the "complimentary luggage assistance" newspaper ad. Respondent announced that future ads would eliminate the word "complimentary."

Troy Kirchner recalled meeting with O'Riley in the ramp office. O'Riley asked Kirchner what the employees were mad about.[12] Kirchner responded that employees were upset by Pessek's treatment of them. They viewed her issuance of discipline as unfair. Kirchner told O'Riley that he thought a company policy requiring that drivers who accidentally picked up a competitor's customers had to take them back to the airport rather than dropping them across the street at the competitor's facility was bad for Respondent's business. According to Kirchner, Respondent had no practice of inquiring into employee discontent. Kirchner recalled a suggestion box in 1994 but did not know what had happened to it.

Kirchner also recalled speaking with O'Riley shortly after the meeting at the Hilton Hotel on August 5. Kirchner told O'Riley about his concern regarding cameras in the vans. O'Riley told Kirchner that the company was going to look into the matter.

Dan Kassera testified that O'Riley and Gipson approached him in the break room at the ramp and asked "what the problems were, why all of a sudden the employees wanted a union." They said they were willing to listen and willing to be reasonable. Kassera believed that this conversation occurred in mid-July, shortly after the petition for representation was filed. In response, Kassera explained that the employees liked their prior manager Lora Boley and

[12] Kirchner could not recall O'Riley's specific words. The above testimony was given after he refreshed his recollection by reference to the affidavit which he gave to the Board. Prior to looking at the affidavit, Kirchner said he could not recall the specific words but the intent was to find out why the employees were unhappy or why the Union was trying to come in.

missed her. He also told O'Riley and Gipson that during the last two summers, drivers could not turn on their air conditioners until they picked up customers and started to the airport. He explained that it was "murderously hot" inside the un-airconditioned vans, which felt like "a steam bath." Kassera opined that such heat was difficult for many customers, as well as the drivers. Kassera also suggested that the corporate office institute a suggestion form in order that employees could set out their thoughts and problems. As to this idea, either O'Riley or Gipson said they would take the idea back to the corporate office. Kassera also complained that Pessek was not fair and reported that she took drivers' tips sometimes. Both O'Riley and Gipson expressed concern about this.

Gipson stated that the company tried to have employee meetings at each terminal one or two times per year. No specific dates were provided and it is undisputed that no one from the corporate office had spoken to the employees at the Bloomington facility for several years. Gipson testified that generally, someone from the corporate office reported to employees about policies of the company and the status of the company. The meetings were also for management to hear local concerns or questions from employees at each facility. Gipson recalled that he told employees that he was there to hear their concerns and to try to answer any questions they might have. Gipson recalled specific discussions with Kassera regarding problems that Kassera believed existed in management of the facility.

Anderstrom recalled that he held an employee meeting in May 2002. At the meeting, he discussed appropriate driver behavior. The meeting ended with a question and answer period during which drivers could bring up anything they wanted. Thereafter, Anderstrom testified he conducted such meetings on a six-month basis. Anderstrom acknowledged that sometimes there was a five-month or seven-month hiatus between meeting dates. Anderstrom explained that he usually concluded these meetings by asking if anyone had any questions or anything to discuss. Anderstrom agreed that he did not explicitly solicit employee problems at these meetings.

On August 6, Anderstrom posted a memorandum stating, inter alia,

> We want to particularly thank all of you who voiced your concerns, brought problems to our attention, and made suggestions to improve not only the efficiency of how we operate, but most importantly, the service to our customers . . . . As we committed, we will research the individual issues that were brought to our attention and will respond personally to those individuals and we will discuss and get back to everyone on those issues and concerns that impact everyone.

By letter of August 18, Frederick D. Clemente, President and CEO of Respondent, thanked employees for voicing their concerns and bringing problems to Respondent's attention. The letter continued, "I want to assure you that I have been made aware of the various items and have instructed Operations to work with Daryl [Anderstrom] to resolve each of them."

In *Clark Distribution Systems,* 336 NLRB 747, 748 (2001), relied upon by General Counsel, the Board summarized the principles regarding solicitation of grievances with a promise to remedy them as follows: [13]

> Absent a previous practice of doing so . . . the solicitation of grievances

[13] In doing so, the Board quoted the language set forth by Judge William N. Cates in *Capitol EMI Music,* 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

> during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . .[T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. . . . [T]he inference that an employer is going to remedy the same when it solicits grievances in a pre-election setting is a rebuttable one . . . .

There can be little doubt that Respondent's actions violated these principles. As the credible evidence set forth above indicates, Respondent had no practice of soliciting grievances prior to the advent of the Union. No corporate managers had visited with employees for years prior to the Union campaign. Manager Anderstrom's meetings with employees, held on a more or less regular basis, included question and answer periods. There is no evidence beyond this assertion and I find, accordingly, that this evidence does not constitute evidence of a regular solicitation of employee grievances. Both testimonial and documentary evidence amply supports a finding that Respondent systematically solicited employee grievances as soon as it learned there was a Union campaign. Moreover, on two occasions, Respondent explicitly promised to remedy employee concerns. I find by a preponderance of the credible evidence that by soliciting employee grievances and both implicitly and explicitly promising to remedy them, Respondent interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.

## D. Termination of Dan Kassera

### 1. Respondent's Disciplinary Policy

Preliminarily, it should be noted that Respondent maintains a written progressive disciplinary policy. The first enumerated step, a "remedial discussion," is limited to a "minor offense." A "remedial discussion" is noted in the employee's personnel file. The second step for a "minor offense" is a "verbal reprimand." A "verbal reprimand" is also noted in the employee's personnel file.

A "written reprimand" is issued for "misconduct" and may be accompanied by "disciplinary time off without pay." Finally, an "employee will be discharged as the result of a serious offense or upon receipt of three (3) written warnings within a one (1) year period."

Respondent's policies and procedures manual explains that immediate discharge "may" follow a single instance of 1 of 23 enumerated offenses, including "immoral, indecent, or violent misconduct while on duty, while on [Respondent's] premises, or while in [Respondent's] vehicle," "off-duty misconduct harmful to [Respondent]," and "harassment of any kind of any [Respondent] employee or member of the public."

### 2. Reasons Relied upon for Termination of Kassera

General Counsel asserts that Kassera was discharged for three reasons: his protected, concerted activity of presenting a group idea to Anderstrom for a problem-solving committee; his protected, concerted activity of complaining about disciplinary action of dispatcher Elaine Pessek; and/or his Union activity.

Respondent argues that Kassera was discharged because Kassera referred to

dispatcher Pessek as "Godzilla" in speaking to his fellow employees. Respondent's discharge notice to Kassera characterized this language as harassment, insubordination, and gross misconduct.

Thus, in analyzing whether Kassera was discharged for the activity of presenting a group idea for a problem-solving committee or for his Union activity, mixed motives are ascribed. On the other hand, in analyzing whether Kassera was discharged for the activity of speaking to his co-workers about dispatcher Elaine Pessek's disciplinary actions and referring to her as "Godzilla" during these conversations, the parties rely on a single set of circumstances.

In cases involving dual motivation, such as General Counsel's assertions that Kassera was discharged for his activity of presenting a group idea for a problem-solving committee and/or for his Union activity, the Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line, supra,* 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB No. 123, slip op. at 2 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services, supra*:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB No. 94, slip op. at 3 (2003).

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line, supra,* 251 NLRB at 1088, n. 11.

In cases in which the parties rely upon the same set of circumstances to justify the discipline or discharge, the only issue is whether the employee lost the protection of the Act. *Felix Industries,* 331 NLRB 144, 146 (2000). Specifically, did Kassera's use of the term "Godzilla" (and the terms "bitch" and "witch" reasonably attributed to Kassera by Respondent) to refer to Pessek, when speaking to his co-workers, cause Kassera to lose the protection of the Act.

3. General Counsel's Initial Burden under *Wright Line*

a. Protected, Concerted Activity

At the time of his termination, Dan Kassera, a night shift van driver, had been employed by Respondent for about 11 years. Kassera testified that in approximately May or June, after speaking with his co-workers, he presented Anderstrom with the idea to have a problem-solving committee at the facility. Anderstrom said, "No, absolutely not." Kassera asked why and Anderstrom responded "Because that sounds too much like a labor union."

I find that General Counsel has not sustained the initial burden of showing that Kassera's activity of putting forth a suggestion that Respondent set up a problem-solving committee at the facility was a motivating factor for his discharge. Although the credible evidence indicates that Kassera took this action with and/or on the authority of other employees and not solely on his own behalf, *Meyers Industries,* 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), cert. denied, 474 U.S. 948 (1985), reaff'd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), there is no evidence that Respondent knew that Kassera was presenting a group idea. The relevant testimony is as follows:

A: And so then me and Troy [Kirchner] and some of the other drivers, we were feeling really frustrated.
Q: So what did you do?
A: I kind of got elected. We thought it would be nice if we could have a problem solving committee. . . . Where a few drivers from each shift could occasionally meet with Daryl [Anderstrom] . . . and we would actually have permission to make suggestions, to even have ideas that are different from his . . . and discuss the issues and problems that we were having and try to solve the problem together as a team.
Q: . . . And so did you make that suggestion?
A: Yes, I did. I went to Daryl's office . . . and I did make the suggestion to him. . . .
Q: And what did he say?
A: Well . . . He allowed me to speak and give him the ideas . . . he said "No, absolutely not" and I asked him why. I said "Well, Daryl, why not work together as a team. Why can't we have a problem solving committee" and he said "Because that sounds too much like a labor union".

Respondent's knowledge of the concerted nature of Kassera's actions must be shown by General Counsel. *Reynolds Electric,* 342 NLRB No. 16, slip op. 1-2 (2004)(the issue is whether the decision maker knew of concerted activity, not whether decision maker reasonably should have known). From the above testimony, I find insufficient evidence that Respondent knew Kassera was presenting a group idea. The sole plural reference in Kassera's discussion with Anderstrom: Why can't we have a problem solving committee, would not, in my view, alert the listener to the group genesis of the idea. Further, there is no evidence of any other presentation of the idea of a problem-solving committee by any other employee nor was it brought up at a meeting attended by employees and management. See, e.g., *Consumers Power Co.,* 282 NLRB 130, 131-132 (1986); *Every Woman's Place,* 282 NLRB 413 (1986). Accordingly, I find that General Counsel has failed to prove that Respondent had knowledge of the concerted nature of Kassera's action. Nevertheless, I credit Kassera's testimony that Anderstrom rejected the idea as too similar to a labor union.

b. Union Activity

Thereafter, Kassera and Troy Kirchner contacted the Union and met Union representative Leland Johnson to discuss organizing Respondent's employees. Armed with Union literature, pamphlets, and authorization cards, Kassera, Kirchner, and others gathered signatures on the authorization cards. Kassera testified that he personally solicited four or five signatures.

Bloomington manager Daryl Anderstrom recalled that he learned about Union activity from employee Tom Deegan, who reported that a Union representative had called on him at his home. A June 29 e-mail from Anderstrom to East Coast vice president of operations Brett Bodenan conveyed this knowledge to corporate headquarters.

Through conversations with employees, Anderstrom deduced which employees supported the Union. In late June, Anderstrom exchanged e-mails with Bodenan and Dennis O'Riley, former vice-president of operations, regarding these conversations in which he reported that Alvin Filipek, Jim Himmerick, Dan Kassera, Troy Kirchner, Bob Wadsworth, and Georgette Dietrich were supportive of the Union, although none of them was openly supportive of the Union. Anderstrom also forwarded to the corporate office a note from assistant manager Bruce Davidson reporting that Kirchner, Kassera, and Himmerick were definitely in favor of the Union. Consultant Billy Gipson agreed that he was aware that both Kassera and Kirchner were in favor of the Union.

Following filing of the petition for representation on July 13, Kassera spoke with Pessek in the break room. This was the occasion, discussed *infra,* in which Pessek told Kassera, "We don't need a damn union around here." "You are nothing but a damn troublemaker."

Finally, during an investigation conducted on September 29, Filipek told Anderstrom and Respondent's labor attorney that Kassera and Kirchner brought in the Union.

Based upon a preponderance of the credible evidence, I find that General Counsel has sustained the initial burden of showing that Kassera's Union activity was a motivating factor for his discharge. There is little dispute that Kassera engaged in Union activity and that Respondent was aware that Kassera was a Union sympathizer. Then in late September, Respondent learned that Kassera was one of two employees who started the Union movement. His discharge followed within weeks. This timing[14] as well as the specific animus expressed by Pessek against Kassera for his Union activity, and the general animus against Union activity, as discussed in the Section 8(a)(1) findings, provide ample evidence that antiunion sentiment was a motivating reason for Respondent's discharge of Kassera.

4. Respondent's Rebuttal under *Wright Line*

On September 22, Pessek came into Anderstrom's office, closed the door, put an envelope on his desk, and began crying. She asked Anderstrom if she had done something wrong. Noting that the envelope was addressed by hand to Pessek's home, Anderstrom opened the envelope and discovered that it contained a Playboy centerfold featuring Miss April. Anderstrom said to Pessek, "I don't understand this. I don't understand what the message is here." He held the envelope upside down and a note fell out. Pessek was surprised and told

[14] See, e.g., *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995); *Sawyer of Napa,* 300 NLRB 131, 150 (1990).

Anderstrom that neither she nor her husband had seen the note. The note stated,[15]

> TO THE WICKED WITCH:
> DON'T YOU WISH YOU LOOKED LIKE THIS
> YOU UGLY BEAST
> THE DRIVERS

Pessek responded, "I will own [Respondent] if you don't do something about this." Anderstrom immediately referred the matter to the corporate office.

All parties agree that during the summer, at about the same time as the Union campaign, a poster of Hitler was posted in the break room. In fact, Anderstrom was told that a picture of Adolf Hitler was posted in the break room and that it had Pessek's name written on it. No investigation of this matter occurred. According to Anderstrom, Pessek told him she was upset about the posting but she would "let it go." Pessek agreed that she did not ask for an investigation of the matter. Dave Ward, cashier, observed the Hitler posting on several occasions. The last time he observed this poster, the name "Elaine" was written beneath the picture. Ward told Pessek about the posting.

Driver and weekend dispatcher Bruce Swanson also spoke to Pessek about the Hitler posting around the time of the Union campaign. This happened because he entered the main area and could tell Pessek, the only person there, was upset. He asked if she was okay. She seemed distraught, upset, almost livid.

No investigation of the Hitler matter was conducted. Regarding the centerfold, Respondent's attorney conducted an investigation into the matter including interviews of about one-fourth of the work force on September 28 and 29. Many of those interviewed were asked to provide handwriting samples for comparison with the hand-addressed envelope. Four of those interviewed (Kassera, Kirchner, Swanson, and Filipek) signed written statements prepared by Respondent's attorney.

During Kassera's interview with Anderstrom and Respondent's attorney, Kassera denied sending the centerfold and note to Pessek. He voluntarily provided a handwriting sample for analysis. Kassera was asked by Respondent's attorney why the drivers held animosity towards Pessek. Kassera explained that she issued discipline excessively and treated the drivers poorly. Kassera admitted to Respondent's attorney that he referred to Pessek as "Godzilla" when he spoke about her to his fellow employees.

Bruce Swanson, who had been with Respondent for six months, told Respondent's attorney that he heard Kassera refer to Pessek as "the witch" and "the bitch." Additionally, Swanson told the investigators that when Kassera was upset about the security cameras in the van, Swanson reassured Kassera that the cameras were not used to spy on the drivers. Kassera said to Swanson, "You mean they can't see us when Troy and I are looking at our Playboy magazines out there." Swanson responded that was correct.

Alvin Filipek was also interviewed on September 29. Filipek told Respondent's attorney that Kassera called Pessek "Godzilla" when speaking to him about her disciplinary actions.

[15] The entire note was typewritten in capital letters.

On October 13, Respondent's attorney reported his findings. Although he concluded that the interviews and the expert handwriting analysis failed to adduce conclusive evidence regarding the source of the letter and centerfold, by crediting some employees and discrediting others, he noted that, "it would not be unreasonable to conclude that Kassera and Kirchner were involved to one extent or another in sending the offensive letter . . . [although] the evidence is insufficient to support this conclusion with any degree of certainty." In any event, Respondent's attorney concluded that because Kassera, in conversations with fellow employees, referred to Pessek as "Godzilla," "bitch," and "witch," and showed no remorse at use of these terms, there was "a strong likelihood for continuation of such demeaning language in the workplace."

Contractor Billy Gipson testified that the decision to discharge Kassera was made by consensus between himself, Brett Bodenan, vice president of operations, and Fred Clemente, president of Respondent. They relied on their attorney's written report, with four supporting employee statements.[16]

The consensus was that given Kassera's actions in violation of Respondent's sexual harassment policy, a hostile working environment was created. Gipson noted that the group also relied on the lack of any remorse from Kassera. The group felt that they could not allow their employees to be treated this way so they decided to terminate Kassera. Gipson further explained,

> Well, the statements he continually made [such as "Godzilla," which Kassera admitted and "beast,[17] witch, bitch," which other employees attributed to Kassera] were regarding our supervisor that he repeated to other people. And while there was nothing necessarily conclusive on – on some of the issues, some of the mailings, et cetera, given it was so consistent with what he admitted to, we had – we had a reasonable amount of certainty ourselves, personally, that combined with, you know, his own statements, that other actions of his probably were directed at the supervisor. . . . It [Kassera's statement] was not one time fly-off-the-handle. It seemed to be kind of a concerted pattern, or a consistent pattern.

Gipson admitted that there was no certain proof that Kassera sent the centerfold and note to Pessek. The employee handwriting samples submitted during interviews with Respondent's attorney did not yield definitive results. However, Gipson noted that Kassera admitted talking about centerfolds on a "number of occasions right around the time [of Pessek's mailing]." Gipson further explained,

> It was just all consistent and seemed to give some credence to the fact that, even though we couldn't prove it conclusively, we believed that he probably was involved in those, in mailing those mailings, and that combined with what he had admitted himself and what others testified to or stated, we felt we had no choice but to terminate him.

[16] These statements were from Troy Kirchner, Dan Kassera, Bruce Swanson, and Alvin Filipek.

[17] Although Gipson testified that the term "beast" was attributed to Kassera by other employees, there is no evidence of this. Accordingly, this portion of his testimony is inaccurate and is disregarded.

Although Anderstrom had made decisions to discharge three or four employees in prior situations, he was not involved in this decision. Anderstrom read a written statement from the corporate office when he discharged Kassera.

Based on the above evidence, I find that Respondent has not shown that it would have discharged Kassera absent his Union activity. Initially, I note that no investigation was undertaken regarding the Hitler posting. Anderstrom's excuse – that he had never seen the Hitler posting therefore he had no duty to investigate it – was illogical and I discredit it. Although characterizing a supervisor as "Hitler" may not have any sexual harassment component, it nevertheless had as much pure harassment, insubordination, and gross misconduct as "Godzilla." Yet, nothing was done. The record contains no explanation for different treatment of the two incidents.

Secondly, as argued by General Counsel, Respondent's investigation was flawed. I note that in investigating the centerfold mailing, Respondent interviewed only a quarter of the work force and took statements from only four employees, including the two employees who started Union activity at the facility. Failure to conduct a meaningful investigation is an important indicia of discriminatory intent. *Bourne Manor Extended Health Care Facility,* 332 NLRB 72, 81 (2000), and cases cited therein. Further, when confronted with evidence from Swanson that Kassera called Pessek "Godzilla," bitch, and witch, Respondent did not seek to counsel Kassera about its conclusion that his language to other employees was creating a hostile working environment. Rather, Respondent assumed from Kassera's demeanor that he "showed no remorse." Kassera was never offered the opportunity to alter his language. Such action indicates that Kassera's discharge was a foregone conclusion.

In making a finding that Respondent unlawfully discharged Kassera, I am sensitive to an employer's responsibility to address workplace harassment. See, *St. Pete Times Forum,* 342 NLRB No. 53, slip op. at 2 (2004), citing *Adtranz ABB Daimler-Benz Transportation v. NLRB,* 253 F.3d 19, 27 (D.C. Cir. 2001). Nevertheless, the record leaves me unconvinced that Kassera's discharge was mandated by Title VII of the Civil Rights Act of 1964.

Moreover, to the extent Respondent relies on its conclusion that Kassera had something to do with the centerfold mailing, Respondent's attorney notes that this is a flawed conclusion, characterizing the evidence as "insufficient" to support such a conclusion. I also note in this regard that the handwriting analysis was inconclusive. Accordingly, both in Respondent's investigation and on the record before me, there is no credible evidence that Kassera played any part in sending a Playboy centerfold to Pessek.

Finally, Respondent learned on September 29 that Kassera was one of two employees who started the Union. The decision to discharge him was made about two weeks later. This timing supports an inference of unlawful motive. In conclusion, I find that Respondent has failed to show by a preponderance of the evidence that it would have discharged Kassera absent his Union activity. Based upon a preponderance of the credible evidence, I find that Respondent's discharge of Kassera was motivated by his Union activity.

5. Did Kassera's use of terms such as "Godzilla" in the context of his complaints about Pessek's disciplinary actions to his co-workers cause him to lose the protection of the Act?

On August 16, O'Riley received an anonymous letter dated August 8, from "CONCERNED [Respondent] EMPLOYEES IN MINNEAPOLIS, regarding "UNION."[18] It was signed simply "MINNEAPOLIS DRIVERS." The first paragraph of the letter, constituting a grievance against dispatcher Pessek, is as follows:

> SOME OF US HERE ARE UNDECIDED ABOUT VOTING FOR THE UNION AUGUST 24. HOWEVER, THERE ARE A COUPLE OF THINGS WE ARE VERY UPSET OVER: WE HAVE ALL REACHED THE END OF OUR ROPE WITH ELAINE PESSEK'S CONTINUED HARASSMENT. SPYING ON US, BELITTLING US, WRITING US UP FOR THINGS WE DIDN'T EVEN DO. THE WORST PART IS THAT DARYL [ANDERSTROM] DOES NOTHING TO STOP IT!! ELAINE MAKES $13/HR AND SHE IS HARDLY EVER IN THE DISPATCH BOOTH. SHE CALLS ON OTHER DRIVERS TO DO HER WORK WHILE SHE IS DOWN IN THE OFFICE DOING NOTHING MEANINGFUL. THAT MAKES US SHORT ON DRIVERS WHICH CERTAINLY IS NOT GOOD FOR PROMPT CUSTOMER SERVICE. PLUS, THOSE DRIVERS LOSE TIPS WHILE THEY ARE DISPATCHING. SOMETIMES SHE GETS IN OUR BUS AND CONFISCATES OUR TIPS! WE NEVER GET THEM BACK! WHERE DOES THIS MONEY GO? DO YOU GUYS KNOW THIS IS HAPPENING? ELAINE RUNS THIS PLACE AND DARYL [ANDERSTROM] AND BRUCE DAVIDSON DO WHATEVER SHE WANTS. SHE IS NOT EVEN MANAGEMENT! HER LAST JOB WAS AT A PRISON AND SHE TREATS US LIKE WE'RE HER PRISONERS! WE WANT HER OUT!!!

The missive also complained that Anderstrom "relentlessly harassed" employees, it questioned Respondent's discharge of an employee, and Respondent's failure to give that employee his 10-year reward.

Anderstrom agreed that employees complained about Pessek, and specifically, that they complained because they felt she issued unwarranted warnings about "nit-picky little things." Anderstrom agreed that Pessek issued one or two warnings a month.

Moreover, the attorney's report of October 13 notes that both Kassera and Kirchner disliked Pessek. As O'Riley, Gipson, and Anderstrom knew, this dislike was, at least in part, due to Kassera's, Kirchner's, and the "MINNEAPOLIS DRIVERS'" shared belief that Pessek issued unwarranted disciplinary action for minor infractions of the rules. Thus, when both Kassera and Kirchner were questioned about why the employees wanted a Union, both responded with examples of Pessek's disciplinary behavior. As General Counsel notes, separately expressed dissatisfaction is concerted where the individual concerns are a logical outgrowth of the concerns expressed by the group. *Mike Yurosek & Son,* 307 NLRB 1037, 1038-1039 (1992), enfd. 53 F.3d 261 (9th Cir. 1995).

Respondent was aware that Kassera used the term "Godzilla" when speaking to other employees, referring to Pessek's management style. Thus, Anderstrom agreed that as far as he knew, Kassera only used the term "Godzilla" when he was speaking with other employees. Moreover, in Swanson's statement to Respondent's attorney dated September 29, credited by Respondent's attorney and relied upon in discharging Kassera, Swanson notes that Kassera

[18] The entire letter is typewritten in capital letters.

and Kirchner made references to Pessek as "Godzilla" "in conjunction with describing her, Elaine, as being overbearing and as applying the work rules too strictly." Similarly, Filipek's statement to the attorney notes, "[Kassera] regularly referred to [Pessek] as 'Godzilla' when speaking to me. He said she was writing employees up too often and with no basis."

As noted above, because the parties rely on the same set of circumstances, the only issue before me in analyzing whether Kassera's discharge was due to his concerted activity of complaining about Pessek's disciplinary action, is whether his use of the term "Godzilla," which Kassera admits, or use of the terms "witch" or "bitch," which Swanson attributed to Kassera, in speaking to his co-workers, removes Kassera's actions from the protection of the Act.

In order to determine whether concerted activity retains the protection of the Act, the right of employees to engage in concerted activities must be balanced against the right of an employer to maintain order and control. See, e.g., *New Process Gear,* 249 NLRB 1102, 1109 (1980). Examination of four factors informs this analysis: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's comments, and (4) whether the comments were, in any way, provoked by the employer's unfair labor practice. *Atlantic Steel Co.,* 245 NLRB 814, 816-817 (1979). Generally, an employee will lose the protection of the Act if his actions are opprobrious, malicious, defamatory, profane, egregious, or offensive. See, e.g., *HCA/Health Services,* 316 NLRB 919 (1995); *American Hospital Assn.,* 230 NLRB 54, 56 (1977).

Importantly, it must be emphasized that there is no evidence that Kassera ever called Pessek anything derogatory to her face. Employee discussions about Pessek's disciplinary actions were held outside management's presence, usually in the break room. The discussions were about perceived favoritism of Pessek and her strict enforcement of Respondent's policies in what employees believed was "nit-picky." No matter how derogatory, use of the terms "Godzilla," "witch," or "bitch," about a management style when speaking to co-workers does not rise to the level of egregious conduct. cf. *Beverly Enterprises,* 310 NLRB 222, 225-226 (1993)(Respondent would have fired employee in any event for telling other employees that director of nursing was a "wicked old witch who practiced witchcraft on her patients and other employees" in light of prior outbursts of profanity directed at the director of nursing). These factors militate in favor of retention of the protection of the Act. Moreover, Respondent's attempt to characterize Kassera's language as an expression of personal animosity toward Pessek must fail in the absence of record evidence to support the assertion. Finally, I find the evidence inconclusive as to whether Kassera's language was provoked by Respondent's unfair labor practices. Certainly, Pessek's calling Kassera a "damn troublemaker," would not endear her to Kassera. However, Kassera's use of the terms apparently pre-dated this unfair labor practice to some extent.

Based upon a preponderance of the credible evidence, I find that employees' Section 7 right to discuss their working conditions outweighs any interference with Respondent's right to maintain order and control that use of the terms such as "Godzilla," "bitch," and "witch" may have caused. Moreover, in examination of the place, subject matter, and nature of Kassera's comments, these factors militate in favor of retention of protection of the Act. The fourth factor yields an indeterminate effect. Finally, I conclude that Kassera's language was not sufficiently egregious to constitute activity unprotected by the Act.

### E. Discipline of Kirchner

General Counsel alleges that van driver Troy Kirchner was placed on a 90-day probationary period on October 15 because of his protected, concerted and Union activity.

Respondent claims that the basis for this action was its conclusion that Kirchner had engaged in sexual harassment by creating a hostile working environment in using the term "Godzilla" to refer to Pessek. Thus, for the reasons stated above regarding the appropriate analysis in dual motivation cases, the analysis set forth in *Wright Line* will be utilized to determine whether Kirchner was disciplined for his Union activity. The analysis set forth in *Tower Industries* is applicable to the allegation that Kirchner was given a 90-day probationary period for his concerted activity of complaining about Pessek's management style.

1. General Counsel's Initial *Wright Line* Burden

Troy Kirchner began working for Respondent as a van driver in 1994. With Kassera, Kirchner contacted the Union, distributed Union literature, and solicited Union authorization cards. It is undisputed that Respondent was aware by late June or early July that Kirchner and Kassera were supporters of the Union. It is also undisputed that on September 29, Respondent learned that Kirchner, together with Kassera, were the two employees who started the Union.

Although there is no direct evidence of animus toward Kirchner, specifically, there is substantial evidence of animus toward the Union and toward those who supported the Union, generally. Based upon this evidence and the timing of imposition of the 90-day probationary period immediately after Respondent learned of Kirchner's involvement in bringing in the Union, I find that General Counsel has sustained the initial *Wright Line* burden.

2. Respondent's Rebuttal

Driver/weekend dispatcher Bruce Swanson told Respondent's attorney that Kassera and Kirchner both referred to Pessek as a bitch and a witch and "Godzilla."[19] Swanson also recalled Kassera being upset about the cameras mounted on the vans and remarking, "I guess they'll be able to see Troy [Kirchner] and me looking at our Playboys." Swanson's written statement, provided to Respondent's attorney on September 29, incorporates these assertions.

On September 29, Respondent's attorney also interviewed Kirchner and prepared a statement for his signature. In this statement, the following appears: "I have never heard any employee call Elaine a bitch, witch or beast. I have never referred to Elaine in that way. The only thing other than Elaine that I have heard her referred to as is 'Godzilla' by [Kassera]. He would be the first to admit that." Additionally, Kirchner denied sending the centerfold and note to Pessek and stated that he had no knowledge about who did this. Kirchner also provided a handwriting sample.

On October 13, Respondent's attorney presented his findings to Respondent. He noted that he believed Swanson's statement over that of Kassera and Kirchner. Thus, he concluded that both Kassera and Kirchner referred to Pessek as a bitch, witch, or "Godzilla." He noted that the note enclosed with the centerfold used similar language, i.e., "wicked witch" and "ugly beast."[20] Further, he concluded that both Kassera and Kirchner harbored a high degree of

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[19] Swanson could not remember the name of the monster that Kassera and Kirchner utilized. Undoubtedly, it was "Godzilla" to which he was referring.

[20] Although Respondent's attorney cites Kassera admission of use of the term "beast" and "ugly" to describe Pessek, there is no reference to these terms in Kassera's statement to the attorney or any other employee's statement to the attorney and there is no testimonial evidence in this record to support the assertion.

"personal animosity" towards Pessek and that Kassera made a reference to looking at Playboy centerfolds while at work. Finally, regarding Kirchner, the report concluded:

> [T]he evidence shows that [Kirchner] shared Kassera's strong antipathy and dislike of [Pessek] and that he likely used derogatory terms in referring to her to co-workers. I also conclude that Kirchner lied in this interview when he stated that he had "ever heard any employee call [Pessek] a bitch, witch or beast," and that he "never referred to [Pessek] in that way."

Gipson testified that the decision to discipline Kirchner was made by himself, Brett Bodenan, and Fred Clemente. Although Anderstrom has made decisions to discharge three or four employees in prior situations, he was not involved in this decision. Anderstrom read a written statement from the corporate office when he imposed the 90-day probationary period on Kirchner. Gipson testified:

> [Kirchner] admitted to the same sorts of derogatory statements against [Pessek]. I believe also "Godzilla, beast." I'm not sure exactly. We didn't – though we didn't see some of the other evidence or didn't believe that there was as much there as there was with Mr. Kassera, but we felt there was enough there that there needed to be some sort of discipline. [Kirchner] was knowingly referring to [Pessek] in ways that are prohibited under our sexual harassment policy.

For the same reasons set forth with regard to Kassera, I find that Respondent's evidence does not show that it would have imposed a 90-day probationary period on Kirchner absent his Union activity. Specifically, I note there was no investigation of the Hitler incident. Investigation of the centerfold mailing was flawed in that only a quarter of the work force was interviewed, only four employees gave statements, and no counseling of Kirchner occurred. Respondent had no proof that Kirchner was involved in mailing the centerfold to Pessek and, finally, it learned of Kirchner's lead role in organizing the Union at the facility about two weeks before it imposed the 90-day probationary period. Accordingly, I conclude that Kirchner would not have received a 90-day probationary period absent his Union activity.

3. Did Kirchner's use of terms such as "Godzilla" to his co-workers in the context of his complaints about Pessek's disciplinary actions cause him to lose the protection of the Act?

As set forth in the identical analysis about Kassera, Respondent was fully aware of written and oral statements by many of the employees, including Kirchner and Kassera, criticizing dispatcher Elaine Pessek's disciplinary actions. In balancing employees' Section 7 right to discuss their terms and conditions of employment against any interference that use of terms such as "Godzilla" may have caused to Respondent's ability to maintain order and control, for the reasons set forth in Section D.5 *infra,* I find that Kirchner retained the protection of the Act.

4. Kirchner's December leave of absence request and his January 10, 2005, disciplinary warning

From the beginning of his employment, Kirchner was allowed to work for H & R Block preparing tax returns during the tax season. Kirchner worked sporadically during the tax season but continued his full-time status and did not lose any benefits.

According to Anderstrom, during the summer of 2004, he consulted Brett Bodenan about whether a 90-day leave of absence should continue to accrue benefits. Bodenan told Anderstrom that after 30 days, the employee would have to be placed on standby and no benefits would accrue. Respondent's policy limits a personal leave of absence to 30 days.

In January 2005, Kirchner requested the tax season off. Assistant manager Bruce Prahm told Kirchner that he would have to be reclassified as "standby" during that period. Standby employees do not accrue benefits.

However, another employee, Van Sicle, was given time off from January 28 through March 3, 2005, and was not forced to go on standby. Eventually, Kirchner's request was granted. He did not lose any benefits due to the initial denial of his request.

Kirchner received a "remedial discussion" employee warning report from dispatcher Elaine Pessek on January 12, 2005. It stated that at the end of his shift, Kirchner had left accessories turned on in the van and he had parked the van in such a way that, had spaces behind the van been filled, it would have been difficult for the next driver to get the van out. There is no evidence that any other employee has been disciplined for parking in a place where the potential for pulling away might be difficult. Kirchner testified without contradiction that van parking is difficult when the lot is full.

Pursuant to the *Wright Line* analysis, I have found that the General Counsel has shown Union activity, knowledge of Union activity, and animus in general toward Union activity. With regard to Kirchner's request for leave during the tax season, General Counsel has also shown disparate treatment. Respondent did not present any evidence regarding this allegation. Accordingly, I find that Respondent told Kirchner that he would have to go to standby status because Kirchner engaged in Union activity. Similarly, I find that Pessek's employee warning report was motivated by Kirchner's Union activity.

## Conclusions of Law

1. By unlawfully interrogating employees about who started the Union and about other employees' Union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening an employee with unspecified reprisals for supporting the Union, Respondent violated Section 8(a)(1) of the Act.

3. By threatening an employee that he could be fired for insignificant issues if the Union were selected, Respondent violated Section 8(a)(1) of the Act.

4. By creating the impression that employees' Union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

5. By threatening that the employer would not go for a union and that the employer would probably go broke if employees selected a union, Respondent violated Section 8(a)(1) of the Act.

6. By soliciting employee grievances and promising to remedy them, Respondent violated Section 8(a)(1) of the Act.

7. By discharging employee Dan Kassera and imposing a 90-day probationary period on employee Troy Kirchner, refusing Kirchner's request for a period of leave, and issuing him a disciplinary warning, Respondent violated Section 8(a)(1) and (3) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Dan Kassera, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because Respondent did not deprive Kirchner of his benefits while he was absent during the tax season, there is no need for an affirmative order with regard to that violation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

## ORDER

The Respondent, Park 'N Fly, Inc., Bloomington, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Interrogating employees about who started the Union and about other employees' Union activities.

   b. Threatening an employee with unspecified reprisals for supporting the Union.

   c. Threatening an employee that he could be fired for insignificant issues if the Union were selected.

   d. Creating the impression that employees' Union activities were under surveillance.

   e. Threatening that the employer would not go for a union and that the employer would probably go broke if employees selected the union.

   f. Soliciting employee grievances and promising to remedy them.

   g. Discharging employee Dan Kassera and imposing a 90-day probationary period on employee Troy Kirchner, conditioning Kirchner's request for a period of leave

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

on Kirchner's loss of benefits, and issuing him a disciplinary warning.

h. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Dan Kassera full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Dan Kassera whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dan Kassera and the unlawful discipline of Troy Kirchner, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline and discharge will not be used against them in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its facility in Bloomington, Minnesota copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2004.

[22] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: July 26, 2005
San Francisco, California

Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT ask employees who started the organizing for International Brotherhood of Teamsters Local 120 and about other employees' Union activities.

WE WILL NOT threaten employees with unspecified reprisals for supporting the Union.

WE WILL NOT threaten an employee that he could be fired for insignificant issues if the Union were selected.

WE WILL NOT create the impression that we are spying on your Union activities.

WE WILL NOT threaten that the employer would not go for a union and that the employer might go broke if employees selected a union.

WE WILL NOT solicit employee grievances and promise to remedy them in order to dissuade you from supporting the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Dan Kassera full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dan Kassera whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dan Kassera and the unlawful discipline of Troy Kirchner, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline and discharge will not be used against them in any way.

**PARK 'N FLY, INC.**

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Federal Plaza, Suite 700, Milwaukee, WI 53203-2211

(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.